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No. 97-372

In the
Supreme Court of the United States
October Term, 1997

United States of America,

Petitioner,

v.

United States Shoe Corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION AND BRIEF OF ARCTIC CAT, ET AL. AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY AND SUGGESTING LACK OF JURISDICTION

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

This motion is made under Rule 37.3(b) of the Rules of the Supreme Court for leave to file an amicus curiae brief on behalf of Arctic Cat, Inc., BMC Industries, Inc., Carver Boat Corporation, Genmar Industries, Inc., HUFCOR, Inc., Lamex Foods Inc., Miller Waste Mills, Incorporated, Napco International, Inc., Prima Corporation, Spuhl Anderson Machine, Kerry Ingredients, Wellcraft Marine Corp., and MTS Systems Corporation addressing the issue of subject matter jurisdiction of the Court of International Trade. A request has been made to all parties before the Court for oral argument for leave to file the amicus curiae brief. The United States through its Solicitor General, the Honorable Seth P. Waxman, has consented by letter dated November 24, 1997. However, United States Shoe Corporation has not consented. By letter from Brian S. Goldstein, Esq., dated December 11, 1997, consent was denied.[1]

Each of the amici listed above have filed a claim in the United States Court of Federal Claims seeking a refund of money paid under the Harbor Maintenance Tax. Under the lower court decisions, exclusive jurisdiction to hear claims involving Harbor Maintenance Tax payments made on exports was found to exist before the Court of International Trade. The jurisdictional issue is of practical importance because of the differing statute of limitations provisions governing

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, the parties submitting this brief state that neither counsel for the United States nor counsel for United States Shoe Corporation in any way authored this brief, either in whole or in part, and no other person or entity, other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of the brief.

matters commenced before the Court of Federal Claims as opposed to those before the Court of International Trade.

Because the parties before the Court have agreed that jurisdiction below was proper, the issue of subject matter jurisdiction will likely not be adequately addressed by either party. Therefore, an amici brief on that issue is appropriate and in compliance with the Rules of this Court. Accordingly, amici respectfully request that the Court grant them leave to file the accompanying brief on this issue of subject matter jurisdiction.

INTEREST OF *AMICI CURIAE*

Arctic Cat, Inc., BMC Industries, Inc., Carver Boat Corporation, Genmar Industries, Inc., HUFCOR, Inc., Lamex Foods Inc., Miller Waste Mills, Incorporated, Napco International, Inc., Prima Corporation, Spuhl Anderson Machine, Kerry Ingredients, Wellcraft Marine Corp., and MTS Systems Corporation file this brief as amici curiae addressing the issue of subject matter jurisdiction and not in support of either party now before the Court.

Each amici has paid the Harbor Maintenance Tax 26 U.S.C. § 4461 ("HMT") on exports. They have all filed a claim in the United States Court of Federal Claims ("CFC") under the Tucker Act, 28 U.S.C. § 1491(a)(1), seeking a refund of money paid under the HMT, alleging that the tax as applied to exports is unconstitutional as violative of the Export Clause of the United States Constitution. U.S. Const. Art. I § 9, cl.5. All amici refund cases have been stayed pending resolution of this litigation. With the exception of the forum in which their respective claims have been asserted, amici are similarly situated to United States Shoe Corporation. The jurisdictional issue, and thus the determination of which court has the authority to decide these kinds of claims, has a

significant practical affect on the amounts of claims which are recoverable, assuming that the HMT is ultimately declared unconstitutional. Cases in the Court of International Trade ("CIT") are subject to statute of limitations provisions under 28 U.S.C. § 2636. The longest of those, under subsection (i), is two years. In contrast, the limitations period for actions commenced before the CFC is six years. 28 U.S.C. § 2501. As a consequence, amici (and all other claimants similarly situated[2]) will be subject to the assertion of a bar of all claims for periods beyond two years if this Court affirms the lower court's holding regarding CIT jurisdiction over claims arising out of the HMT.

SUMMARY OF ARGUMENT

The argument of amici is that subject matter jurisdiction over claims arising out of HMT as applied to exports are properly before the CFC under the Tucker Act, 28 U.S.C. § 1491(a)(1), not the CIT under 28 U.S.C. § 1581(i). The lower courts' holding of jurisdiction under 28 U.S.C. § 1581(i) is incorrect, in that they ignore the plain language of 28 U.S.C. § 1581(i) and this Court's prior decision on jurisdictional limits of the CIT. Further, having erred in finding jurisdiction of the CIT, the courts erred in not transferring the case to the CFC under 28 U.S.C. § 1631.

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[2] The exact number of taxpayers who have paid the HMT on exports is not reflected in the opinions of the lower courts, but in the class action submissions in Baxter Healthcare Corp. v. United States, 925 F. Supp. 794 (Ct. Int'l Trade 1996), the number of 100,000 taxpayers was submitted.

ARGUMENT

The exclusive jurisdictional basis for a constitutional challenge to a levy under the HMT on an export are the Tucker Acts.[3] Nonetheless, neither court below -- and none of the parties to the proceedings before those courts -- even addressed the Tucker Acts. Instead, in both lower courts, the parties' arguments exclusively revolved around which subsection of 28 U.S.C. § 1581 ought to apply to these claims, subsection (a)[4] or subsection (i).[5] Neither party questioned whether § 1581 applied at all; as the CIT stated in its decision: "[The parties] also agree that the court has subject matter jurisdiction to determine the constitutionality of the Tax." United States Shoe Corp. v. United States, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995).

It is axiomatic that parties to a lawsuit may not merely by agreement convey jurisdiction to a court. As this Court stated nearly sixty years ago, "[t]he jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of litigants to confer." Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939). Not only can parties not confer jurisdiction on a court, this Court has the self-imposed "obligation to consider the question sua sponte." Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 607 n.6 (1978). Amici respectfully urge the Court to carefully review the issue of subject matter jurisdiction in this matter, an issue which will likely be given little or no attention by the parties in light of the shift of position enunciated by the United States in its certiorari petition to the Court. See Petition for a Writ of Certiorari at 7 n.2 (indicating that the United States was not challenging the Court of Appeals holding on jurisdiction because it had determined that the issue was irrelevant to the disposition of the present matter given its procedural posture).

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[3] Amici have brought their claims before the CFC. There is a little Tucker Act under 28 U.S.C. § 1346(a)(2) where concurrent jurisdiction for claims not exceeding $10,000 can be brought. Subsequent references and discussion will only deal with the Tucker Act under 28 U.S.C. § 1491(a)(1).

[4] "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a).

[5] "In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a) - (h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for --

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section . . ..

* * * *"

28 U.S.C. § 1581(i).

1. The CIT Lacked Subject Matter Jurisdiction to Consider United States Shoe Corporation's Claim.

The subject matter jurisdictional statute at issue here is 28 U.S.C.§ 1581. This Court has had one occasion to address this statute. In K Mart Corp. v. Cartier, Inc., 485 U.S. 186, 188 (1988), this Court stated:

> Congress intended, first and foremost, to remedy the confusion over the division of jurisdiction between the Customs Court (now the Court of International Trade) and the district courts and to "ensure . . . uniformity in judicial decision-making process." * * * But Congress did not commit to the Court of International Trade's exclusive jurisdiction every suit against the Government challenging customs-related laws and regulations. Had Congress wished to do so, it could have expressed such an intent much more clearly and simply * * *.

(Citations omitted, emphasis in the original). The clear direction of K Mart is that the jurisdiction of the CIT is limited to the precise areas identified in 28 U.S.C. § 1581. If the issue presented falls outside of those specific areas, the court lacks subject matter jurisdiction.

The lower courts' decisions in United States Shoe Corporation reveal that there was an expansive treatment of CIT jurisdiction based on the general finding that the HMT was a custom-related law. The decisions were not only contrary to the direction of K Mart for limited jurisdiction of the CIT, but were premised specifically upon a misreading of 26 U.S.C. § 4462(f)(2) regarding jurisdiction of courts over HMT matters.

The CIT stated:

> Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

United States Shoe Corporation v. United States, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995).

Similarly, the United States Court of Appeals for the Federal Circuit stated:

> Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters.

United States Shoe Corporation v. United States, 114 F.3d 1564, 1571 (Fed. Cir. 1997).

Both courts construed the term "custom duty" to mean only a tax on import transactions. It is not difficult to understand why, in a constitutional system which prohibits taxes on exports, that the complete meaning of the term would be overlooked. Last term in United States v. IBM, __U.S.__,

116 S.Ct. 1793 (1996), Justice Kennedy reviewed the history of taxes on exports as it related to debate over the Export Clause, __U.S. at __, 116 S.Ct. at 1809-1810. The fact that the Export Clause was adopted does not change the meaning of the term custom duties. This Court observed almost 150 years ago "[c]ustoms are duties charged upon commodities on their being imported into or exported from a country," Marriott v. Brune, 50 U.S., 619, 632 (1850). "Custom duties "is the name given to taxes on the importation and exportation of commodities. 25 C.J.S. Custom Duties § 1. Primary sources existing at the time of the enactment of the HMT such as Webster's New Collegiate Dictionary continue to define "customs" as "duties, tolls, or imposts imposed by the sovereign law of a country on imports or exports." Webster's New Collegiate Dictionary 318 (9th Ed. 1995).

Because the lower courts' definition of custom duties is incorrect, the analysis which was made of the CIT's jurisdiction was flawed. The proper analysis of what court has jurisdiction will depend on what is being taxed. The HMT applies to imports, exports and passengers. In this case, the proper question under § 4462(f)(2) is what court has jurisdiction over the HMT when the tax is on an export?

Certainly § 4462(f)(2) could have been drafted to unequivocally grant jurisdiction to one court to the exclusion of others, but it was not. There is no statutory provision in the HMT defining custom duty in the way the lower courts did (custom duty means only import transactions). Nor does legislative history[6] contain a definition of the term custom duty

[6] Reference was made in both lower court decisions to the legislative history as supporting a determination of jurisdiction in the CIT of HMT matters. The legislative history referred to was H. Rep. No. 99. No. 99-228 at 10 (1986) reprinted in 1986 U.S.C.C.A.N. §§ 6705, 6715 which stated:

which limits its meaning to imports only. To determine the court with authority to hear an export matter, the specific jurisdictional statute must be applied.

In applying the CIT's jurisdictional statute 28 U.S.C. § 1581, only two subsections were considered by the lower courts -- subsection (a) or (i). Both courts were correct in their holding that subsection (a) does not apply. Amici will not repeat that discussion here since neither court based its finding of jurisdiction upon that portion of the statute. With respect to the application of subsection (i), the United States properly asserted that it simply makes no sense to attack a tax on exports in a court which has exclusive jurisdiction over laws relating to imports. The government below argued:

> While a constitutional challenge to a fee imposed upon exports might not fit neatly within subsection 1581(a), it does not fit within subsection 1581(i) at all. * * *
>
> By its own terms, subsection 1581(i) provides jurisdiction only regarding imports not exports. The lower court evaded this obvious barrier by reasoning that (1) Congress intended the HMT to be treated

> The committee amendment provides that for purposes of determining the jurisdiction of United States courts and agencies, the port user charges are to be treated as custom duties. Thus, the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions.

Here again the term custom duty is used without reference to imports or exports. As such, it adds nothing to an understanding of § 4462(f)(2). In addition, the reference to primary jurisdiction of the CIT only adds uncertainty where 28 U.S.C. 1581 speaks of exclusive jurisdiction.

> like a "duty"; (2) "duties" apply to imports; and (3) therefore, the HMT should be considered a "duty" upon "imports" for purposes of establishing jurisdiction under § 1581(i) even when the challenge involves only exports. This reasoning is absurd on its face;...

Brief of the United States before the United States Court of Appeals for the Federal Circuit at p. 20. In its Reply Brief, the Government further stated:

> Finally, plaintiff's attempt to shoehorn this case into provisions of § 1581(i), which, as we demonstrated in our main brief, is clearly inapplicable to constitutional challenges to the HMT as applied to exporters.
>
> While denying that they are engaged in jurisdictional gymnastics, appellees and amici (1) admit that section 1581(i) on its face does not apply to exports; (2) note that section 1581(i) does apply to any "law of the United States providing for revenue from imports"; and (3) reason that, because the HMT applies to importers as well as exporters, section 1581(i) can be invoked to consider a constitutional challenge to the HMT only as applied to exporters.
>
> This reasoning, as we pointed out in our main brief, is plainly absurd. Under this view, any type of challenge to any provision of the sweeping Water Resources Development Act, could be brought in the CIT because that Act is a "law of the United States" providing for revenue from imports. This interpretation would dramatically expand the CIT's

> jurisdiction from a specialized court with exclusive jurisdiction to entertain specific types of international trade disputes into a court of virtually general jurisdiction.

Reply Brief of the United States before the United States Court of Appeals for the Federal Circuit at pp. 9-10. The United States' assessment below of the assertion that 28 U.S.C. § 1581(i) does not provide jurisdiction over this matter was absolutely correct. That assessment, taken in conjunction with the government's acknowledgment that the case did not fit within the parameters of subsection (a) compels the conclusion that there was no jurisdiction at all in the CIT over this custom related (export) dispute.

Prior to its United States Shoe Corp. decision, the Federal Circuit had cited K Mart in discussing the limitations regarding the CIT's jurisdiction in Trayco, Inc. v. United States, 994 F.2d 832 (Fed. Cir. 1993). The specific jurisdictional statute was 28 U.S.C. § 1582. In considering it, the court stated:

> [I]t is also well settled that the Court of International Trade, like other specialized courts, "operates within precise and narrow jurisdictional limits" granted by Congress. * * * Despite the fact that the Customs Courts Act of 1980 broadened the exclusive jurisdiction of the Court of International Trade, it cannot exercise jurisdiction over actions not addressed by a specific jurisdictional grant.

Trayco, Inc. v. United States, 994 F.2d at 836 (citation omitted). The Federal Circuit stated later in Trayco "Congress did not fully explain, and neither can we, why certain customs-related matters are excluded from the jurisdiction of the Court

of International Trade." Trayco, 994 F.2d at 837, citing K Mart, 485 U.S. at 189.

In fact, as to a custom related export tax, it is easy to understand why in 1980 when the jurisdictional statutes for the CIT were enacted, there were no provisions related to exports. Direct taxes on exports did not exist at that time and it was not until the enactment of the HMT six years later that such an export related tax came into existence. Against this background, it is not surprising that nowhere in enabling legislation for the CIT is there any mention of jurisdiction over exports.

2. The Tucker Act, 28 U.S.C. § 1491, Confers Jurisdiction Over this Claim on the United States Court of Federal Claims

Absent such jurisdictional authority in the CIT, the proper court with jurisdiction for recovery of HMT amounts paid on exports is the CFC. The Tucker Act confers jurisdiction over such disputes. It states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Claims for money paid, exacted or taken in contravention of the Constitution are cognizable in the CFC. See Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967). The CFC would lack jurisdiction

only if the CIT was granted exclusive jurisdiction, 28 U.S.C. 1491(c), or upon a clear congressional statement of an intent to withdraw the remedy under the Tucker Act. See Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102, 126-27 (1974). As noted above, Congress did not grant exclusive jurisdiction over all matters involving the HMT to the CIT. Without a showing that the Tucker Act remedy is withdrawn, the Tucker Act is clearly available to HMT export taxpayers who have paid a tax which is unconstitutional under the Export Clause.

CONCLUSION

For the reasons stated above, this Court should determine that jurisdiction over claims for refunds of HMT payments on exports does not come within the specific provision of 28 U.S.C. § 1581 and that jurisdiction lies under the Tucker Act. Leave should be given to claimants who have filed with the CIT to transfer those cases under 28 U.S.C. § 1631.

Dated: December 15, 1997

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